IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL WRIT PETITION NO. 945 OF 2005

ALONGWITH

CRIMINAL APPLICATION NO. 3647 OF 2005

Vinod Soni and another ..... Petitioner.

versus

Union of India ..... Respondents.

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Mr. A.V. Anturkar i/b Mrs. Vinita V. Bakre-Shastry
for the petitioner.

Shri D.M.Salvi for Union of India.

Shri Uday P. Warunjikar with Ms. Varsha Deshpande and
Shaila Jadkar for intervenor.

Ms. P.H.Kantharia APP for the State.

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CORAM ; V.G.PALSHIKAR &
V.C. DAGA, JJ.

DATED; 13TH JUNE, 2005

JUDGMENT. (PER PALSHIKAR, J.);

1. By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter

referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition in so far as the challenge via Article 14 of the Constitution of India is concerned.

2. We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India. Article 21 reads thus:

" Protection of life and personal liberty -

No person shall be deprived of his life or personal liberty except according to procedure established by law."

3. This provision of Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter

of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21. in our opinion, firstly we deal with protection of life and protection of personal liberty. In so far as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he, or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family which an individual can have in exercise of liberty quaranteed by Article 21. It inturn includes nature of sex of that family which he or she may eventually decided to have and/or develope.

4. Reliance was placed, as already stated, on several judgments of the Supreme Court of India on the enlargement of the right embodied under article 21. The right basically deals with protection of life and protection of personal liberty. Personal Liberties have been or personal life has been expanded during the passage of 55 years of the Constitution. It now includes right to pollution free water and air as held in **AIR 1991 S.C. page 420.** It includes right to a reasonable residence for which reliance is placed on a judgment in **Shantistar Builders Vs. Narayan Khimalal Totame reported in AIR 1990 S.C. page 630.** This right to a reasonable residence always postulates right to a reasonable residence on reasonable restrictions and for reasonable price. This right cannot be and the Supreme Court's judgment in **1990 S.C. page 630** does not create a right to a reasonable residence in any citizen, free of any cost.

5. Then reliance is placed on a Supreme Court Judgment in **AIR 1989 S.C. page 677** and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to Food, clothing, decent environment, and even protection of cultural heritage. These rights even if further

expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.

6. The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under article 21, which gives to every child right to full development. A chid conceived is therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expantion, or if it can be so expanded right to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under.

"The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders."

Then para 4 reads thus:

"Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub section 2 says

that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) heamoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.

8. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of

every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination,to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India. Hence it is dismissed. In view of the fact that the petition itself is rejected, the application for intervention is also rejected.

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